

CLOSING THE WAGE GAP: CITIES' AND STATES' PROHIBITIONS AGAINST PRIOR SALARY HISTORY INQUIRIES AND THE IMPLICATIONS MOVING FORWARD

*Timothy J. Nichols**

I. INTRODUCTION

In an effort to eliminate wage discrimination on account of sex, Congress enacted the Equal Pay Act of 1963 (EPA).¹ The EPA amended Section 6 of the Fair Labor and Standards Act of 1938 (FLSA), adding a new subsection.² While this new subsection prohibits employers from paying workers of one sex different wages than workers of the other sex for equal work, the subsection also includes four enumerated exceptions.³ Despite efforts to eliminate wage discrimination based on gender, women earned eighty-three percent of what men earned in 2015 (granted, an increase from sixty-four percent in 1980).⁴ While this pay gap is based on many factors, such as (1) women being more likely to take breaks from careers to care for a family, and (2) women being overrepresented in lower-paying occupations, surveys reveal this gap may also be a result of gender discrimination.⁵

The broadest and most controversial of the exceptions contained in the FLSA is a catch-all that permits disparities in pay between the genders “based on any other factor other than sex.”⁶ Prior salary history, the focus of this Comment, is a regularly relied-upon factor employers assert as a “factor other than sex” when facing claims of gender-based wage discrimination under the EPA and FLSA, as seen in the cases discussed

* J.D. Candidate, 2019, Seton Hall University School of Law; Dual B.A., University of Michigan-Ann Arbor.

¹ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

² *Id.* The Act created 29 U.S.C. § 206(d) that prohibits gender discrimination in wage payment practices. *Id.* at 56–57.

³ 29 U.S.C. § 206(d)(1) (2018).

⁴ Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Apr. 9, 2018), <http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts/>.

⁵ *Id.* Women were twice as likely as men to feel discriminated at work because of gender (42% vs. 22%); also, 77% of women and 63% of men believe more changes must be implemented to achieve gender equality in the workplace. *Id.*

⁶ 29 U.S.C. § 206(d)(1).

below.⁷ Further adding to the controversy is the fact that the different circuit courts that have addressed the relationship between prior salary history and the “factor other than sex” exception have applied different standards in evaluating the claims.⁸ Two circuit courts have held that prior salary history cannot be the *sole* factor in justifying pay disparities between the genders.⁹ Another circuit court allows reliance on prior salary history as the sole justification, but conducts an inquiry into the reasonableness and asserted reasons for the reliance.¹⁰ One circuit court accepts prior salary history as a “factor other than sex” unequivocally.¹¹ Finally, one circuit court just recently eliminated prior salary history in its entirety from the catch-all “factor other than sex” language.¹²

In an effort to continue closing the gender wage gap, multiple cities and states around the country have enacted legislation that prohibits employers from inquiring about applicants’ prior salary histories or requiring applicants to disclose such information.¹³ All of these laws have a general prohibition on employers seeking an applicant’s prior salary history but have certain unique provisions and range from more restrictive to less restrictive depending on the particular law.¹⁴ And although the push to institute these types of laws has intensified, these laws have been met with resistance.¹⁵

This Comment argues that state and municipal legislatures, displeased with the ongoing wage discrepancy between the genders and the analyses and outcomes of the judiciary in cases alleging gender discrimination under the EPA, are enacting these new laws to remove the most controversial element of courts’ analysis. Part II of this Comment provides an in-depth discussion of the EPA and the FLSA, along with the conflicting stances federal circuit courts have adopted regarding the interplay between prior salary history and one of the exceptions of the FLSA. Part III discusses the laws currently enacted by cities and states across the United States as of this writing and compares and contrasts elements of the laws. Part IV introduces some of the emerging backlash against the laws and the implications the laws

⁷ See *infra* Part II.B–D.

⁸ See *id.*

⁹ See *Angove v. Williams-Sonoma, Inc.*, 70 F. App’x. 500, 508 (10th Cir. 2003); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995).

¹⁰ See *Taylor v. White*, 321 F.3d 710, 720 (8th Cir. 2003).

¹¹ See *Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466, 469 (7th Cir. 2005).

¹² See *Rizo v. Yovino*, 887 F.3d 453, 460 (9th Cir. 2018) (en banc).

¹³ Dori Goldstein, *More Laws Enacted to Ban Salary History Inquiries*, BLOOMBERG BNA (Jul. 5, 2017), <https://www.bna.com/delaware-oregon-enact-b73014453430/>; F. Christopher Chrisbens, *San Francisco Joins the Salary History Inquiry “Ban” Wagon*, NAT’L L. REV. (Sept. 7, 2017), <https://www.natlawreview.com/article/san-francisco-joins-salary-history-inquiry-ban-wagon>.

¹⁴ See *infra* Part III.

¹⁵ See *infra* Part IV.

2019]

COMMENT

413

have across the country now and moving forward. Part V argues that the cities and states enacting the laws are effectively circumventing one of the exceptions under the FLSA by removing prior salary in its entirety from consideration, eliminating the catch-all from the courts' analysis. Part VI suggests that, until prior salary history inquiry bans become universally enacted, the Eighth and Ninth Circuits' approach is the correct approach to analyzing prior salary history as a "factor other than sex." Part VII briefly concludes.

II. THE EQUAL PAY ACT, "FACTORS OTHER THAN SEX," AND THE CURRENT CIRCUIT SPLIT

A. *The Equal Pay Act*

As mentioned above, the EPA "prohibit[s] discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce."¹⁶ The new subsection to FLSA added by the EPA states:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.¹⁷

The above text comes with a caveat, however, that a wage disparity ordinarily impermissible under the statute is otherwise permissible: "where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."¹⁸ The "factor other than sex" exception is the broadest-worded exception among the enumerated exceptions, and the statute does not state a scope or any standard for determining which factors qualify as a "factor other than sex."¹⁹ Some have argued prior salary history should be considered a "suspect factor"—a factor that, if courts allow employers to rely on it to permanently justify salary disparities, could perpetuate gender-based violations of the EPA.²⁰

¹⁶ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, 56.

¹⁷ *Id.* at 56–57; 29 U.S.C. § 206(d)(1) (1963).

¹⁸ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, 57 (emphasis added).

¹⁹ Jeanne M. Hamburg, Note, *When Prior Pay Isn't Equal Pay: A Proposed Standard for the Identification of "Factors Other Than Sex" Under the Equal Pay Act*, 89 COLUM. L. REV. 1085, 1087 (1989).

²⁰ *Id.* at 1102.

Courts have also indicated caution when dealing with prior salary history as a “factor other than sex.”²¹ The Ninth Circuit noted that prior salary history could be manipulated to provide a pretext for intentional gender discrimination, and an employer could take advantage of “unfairly low salaries historically paid to women” in order to perpetuate that discrimination.²² The Seventh Circuit recognized the concern that previous employers might have engaged in sex-based discrimination in wage practices, thereby resulting in lower wages for female employees when current employers rely on that tainted prior salary history.²³ Despite this caution, courts accept that prior salary history may justify current pay disparities, but the courts are split on whether prior salary history satisfies the “factor other than sex” exception under the EPA.²⁴

B. *The Circuit Split: Prior Salary History and an Additional Factor*

Some of the circuit courts adopted the viewpoint that prior salary history must be paired with an additional factor in order to qualify as a “factor other than sex” under the EPA. In *Irby v. Bittick*, a female criminal investigator for a county sheriff’s department sued under the EPA when the department paid two new male additions to the team substantially more than she was paid.²⁵ The defendants argued that the reliance on the prior salaries of the male employees in setting their current salaries qualified as a legitimate factor other than sex.²⁶ The district court, however, rejected the argument, holding that “[p]rior salary alone is not a legitimate ‘factor other than sex.’”²⁷ The court explained that if prior salary history was the sole justification, the exception would swallow the rule, perpetuating gender pay inequality.²⁸ On appeal, the Eleventh Circuit recognized that it consistently adhered to the view that under the EPA a pay disparity between the genders cannot be justified by prior salary history alone, and therefore the court rejected reliance on prior salary history as a *sole* justification for the pay disparity.²⁹

While the court rejected a reliance on prior salary history by itself, it nonetheless held that a defendant can rely on prior salary history as a “factor

²¹ See *Covington v. S. Ill. Univ.*, 816 F.2d 317 (7th Cir. 1987); *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982).

²² *Kouba*, 691 F.2d at 876.

²³ *Covington*, 816 F.2d at 323.

²⁴ See *infra* Part II.B–D; see also *Hamburg*, *supra* note 19, at 1085.

²⁵ 44 F.3d 949, 952–53 (11th Cir. 1995).

²⁶ *Id.* at 955.

²⁷ *Irby v. Bittick*, 830 F. Supp. 632, 636 (M.D. Ga. 1993).

²⁸ *Id.*

²⁹ *Irby*, 44 F.3d at 955 (citing *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988)).

2019]

COMMENT

415

other than sex” when the defendant also relied on something else, such as experience.³⁰ The court found “there is no prohibition on utilizing prior pay as part of a mixed-motive.”³¹ Since the defendants relied both on prior salary history and the experience of the two new male employees, the Eleventh Circuit was satisfied that the defendants properly relied on a “factor other than sex” under the EPA to justify a pay disparity.³²

In *Angove v. Williams-Sonoma, Inc.*, a fired male employee sued for, among other things, gender discrimination based on Williams-Sonoma paying him less than a female employee in the same position.³³ The plaintiff suggested that Williams-Sonoma adhered to the “market factor” theory, whereby an employer justifies wage disparities based on the pay rates the two genders command in the marketplace.³⁴ After rejecting this contention for lacking relevance, the court noted that the focus of the plaintiff’s argument was that Williams-Sonoma matched the female employee’s prior salary.³⁵ The Tenth Circuit then stated that considering a new employee’s prior salary history is not prohibited under Section 206(d)(iv) of the EPA.³⁶ Instead, it is the employer’s *sole* reliance on prior salary to justify a pay disparity that is precluded by the EPA; and when an employer bases a new employee’s salary on prior salary history and something else like qualifications and experience, the employer has successfully invoked the “factor other than sex” defense.³⁷ The Tenth and Eleventh Circuits, by requiring an additional factor other than prior salary history for a “factor other than sex” defense, impose the strictest, most scrutinizing view of this exception under the EPA.

C. *The Circuit Split: Prior Salary History, Case-by-Case, and Reasonableness*

Another circuit court accepts the use of prior salary history as the sole factor in a “factor other than sex” defense, unlike the above-mentioned cases,³⁸ but still conducts a factual analysis on a case-by-case basis or inquiries into the reasonableness of the reliance on prior salary history. In *Taylor v. White*,³⁹ a female United States Army employee sued her employer because her male colleagues performing the same work received higher

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 957.

³³ 70 F. App’x 500, 504 (10th Cir. 2003).

³⁴ *Id.* at 507.

³⁵ *Id.* at 508.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *See supra* Part II.B.

³⁹ 321 F.3d 710 (8th Cir. 2003).

pay.⁴⁰ She contended that an employer should be prohibited from relying on prior salary history or a salary retention policy to avoid liability under the EPA because relying on said factors allows the perpetuation of wage inequalities.⁴¹ The Eighth Circuit, however, stated that nothing on the face of the EPA indicates any limitations to the catch-all “factor other than sex” defense, and the legislative history bolsters the view of a broad interpretation of this catch-all exception.⁴² While the court acknowledged that even though a salary retention policy could be used to perpetuate unequal wages based on past discrimination, this concern does not dictate adopting a per se rule finding all salary retention practices inherently discriminatory.⁴³

Rather than adopt a per se rule, the court instead recognized “the need to carefully examine the record in cases where prior salary or salary retention policies are asserted as defenses to claims of unequal pay.”⁴⁴ The Eighth Circuit thought a case-by-case analysis into the reliance on prior salary history or salary retention policies with a discerning eye on the alleged gender-based practices would protect certain freedoms in business as Congress intended with the “factor other than sex” defense.⁴⁵ What the Eighth Circuit did not endorse, however, is conducting a *reasonableness* inquiry into the employer’s actions or limiting the application of a salary retention policy to exigent circumstances only, as it would unnecessarily narrow the intent of the “factor other than sex” defense.⁴⁶ While the Eighth Circuit states that prior salary history alone satisfies the “factor other than sex” factor under the EPA, the case-by-case factual analysis indicates this circuit will view reliance on prior salary history alone with some suspicion.

D. *The Circuit Split: Eliminating Prior Salary History in its Entirety*

The Ninth Circuit initially took a more narrow view than the Eighth Circuit, but still broader than the Tenth and Eleventh Circuits, where a female public school employee sued the county after discovering it paid her less than her male colleagues.⁴⁷ When the county moved for summary judgment, it acknowledged the pay disparity but based the discrepancy on a factor other than sex—prior salary history.⁴⁸ The district court rejected this

⁴⁰ *Id.* at 714.

⁴¹ *Id.* at 717.

⁴² *Id.* at 717–18. “[T]he catch-all provision is necessary due to the impossibility of predicting and listing each and every exception.” *Id.* at 718.

⁴³ *Id.* at 718.

⁴⁴ *Id.*

⁴⁵ *Taylor*, 321 F.3d at 720.

⁴⁶ *Id.*

⁴⁷ *Rizo v. Yovino*, 854 F.3d 1161, 1163 (9th Cir. 2017), *rev’d*, 869 F.3d 1004 (9th Cir. 2017) (en banc).

⁴⁸ *Id.*

2019]

COMMENT

417

defense and denied summary judgment, concluding that reliance exclusively on prior salary history is not a satisfactory “factor other than sex” defense.⁴⁹

Relying on precedent, the Ninth Circuit initially held that there is no strict prohibition against using prior salary history under the EPA, but it does not automatically qualify as a “factor other than sex” for purposes of the affirmative defense.⁵⁰ Rather, prior salary history alone could satisfactorily justify a pay disparity only when “the factor ‘effectuate[s] some business policy’ and that the employer ‘use[s] the factor reasonably in light of the employer’s stated purpose as well as its other practices.’”⁵¹ When the plaintiff argued that relying on prior salary history alone would perpetuate existing pay disparities and therefore undermine the EPA’s intended goal, the court indicated that, in deciding the very same issue in *Kouba v. Allstate Insurance Co.*, requiring the employer to show that using prior salary history effectuated some business policy and the factor was used reasonably would alleviate these concerns.⁵²

On rehearing en banc, however, the full Ninth Circuit eliminated prior salary history from the “factor other than sex” entirely.⁵³ The court reasoned that to continue to allow employers to justify pay disparities with prior salary histories would contravene the text and history of the EPA and “vitiate the very purpose for which the Act stands.”⁵⁴ Furthermore, if employers were able to take advantage of the “factor other than sex” catch-all with prior salary history, a sex-based salary disparity would be based on the very sex-based salary differentials the EPA is supposed to eliminate.⁵⁵ Ultimately, the Ninth Circuit narrowed the “factor other than sex” catch-all to legitimate, job-related factors⁵⁶ and found that prior salary, alone or combined with other factors, is not job related and therefore does not qualify for the catch-all defense.⁵⁷

The Ninth Circuit grounded its reasoning in several arguments. First, looking at the historical context of the EPA, the court found that when the EPA was enacted, prior salary history would have definitely reflected previous gender discrimination in the marketplace.⁵⁸ Further, Congress could not have intended to permit employers to rely on previous

⁴⁹ *Id.*

⁵⁰ *Id.* at 1165.

⁵¹ *Id.* (quoting *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876–77 (9th Cir. 1982)).

⁵² *Id.* at 1166 (citing *Kouba*, 691 F.2d at 876–78).

⁵³ See *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. 2018).

⁵⁴ *Id.* at 456–57.

⁵⁵ *Id.* at 457.

⁵⁶ Such factors include “a prospective employee’s experience, educational background, ability, or prior job performance.” *Id.* at 460.

⁵⁷ *Id.*

⁵⁸ *Id.* at 461.

discriminatory wages, thereby perpetuating the gender disparity.⁵⁹ Second, relying on canons of statutory interpretation, the Ninth Circuit narrowed the “factor other than sex” catch-all to job-related factors. The canon of *noscitur a sociis*, whereby a word’s meaning is understood by surrounding words, dictates that the specific exceptions in the EPA of seniority, merit, and productivity relating to job qualifications extend to the “factor other than sex” language, imposing a limitation to only legitimate, job-related reasons.⁶⁰ Additionally, the canon of *ejusdem generis*, where general words are construed to be similar in nature to enumerated preceding specific words, supports this conclusion.⁶¹ Third and finally, the court took notice of the lobbying efforts of industry representatives who were concerned that legitimate, job-related factors in determining pay would not be covered under the other exceptions, and concluded that the catch-all was only added to assuage these concerns.⁶²

In finding that salary history cannot be used in setting current pay, the Ninth Circuit overruled *Kouba*, announcing that prior salary history is not job related and that continuing to allow employers to rely on such would perpetuate the gender-based discrimination the EPA was intended to expunge.⁶³ The Ninth Circuit takes by far the most extreme view of prior salary history, railing against its use to perpetuate gender wage disparities and eliminating it from the “factor other than sex” analysis entirely.

E. *The Circuit Split: Deference to the Defense*

One circuit court, in the broadest interpretation of the “factor other than sex” defense under the EPA, accepts prior salary history as a factor other than sex without any qualifications or limitations.⁶⁴ A female employee for the Department of Human Services in Illinois sued under the EPA, putting forward two arguments: (1) prior salary history must include an acceptable business reason; and (2) the use of prior salary history discriminates because all pay systems inherently discriminate based on sex.⁶⁵ The Seventh Circuit noted how four appellate courts accept prior salary history as a “factor other than sex,” but only if the employer had an acceptable business reason.⁶⁶ In looking to the actual statute, however, the court found that nothing in Section 206(d) allows a court to set standards on what qualifies as an acceptable

⁵⁹ *Rizo*, 887 F.3d at 461.

⁶⁰ *Id.* at 461–62.

⁶¹ *Id.* at 462.

⁶² *Id.* at 463–64.

⁶³ *Id.* at 468.

⁶⁴ *See Wernsing v. Dep’t of Human Servs.*, 427 F.3d 466 (7th Cir. 2005).

⁶⁵ *Id.* at 468.

⁶⁶ *Id.*

business practice, and that “the statute asks whether the employer has a reason other than sex—not whether it has a ‘good’ reason.”⁶⁷ As long as employers avoid forbidden reliance on criteria like race or sex, employers may set their own standards for determining pay.⁶⁸ The Seventh Circuit’s rule for prior salary history as a “factor other than sex” is reduced down to a single sentence: “[T]he employer may act for any reason, good or bad, that is not one of the prohibited criteria such as race, sex, age, or religion.”⁶⁹

There is one caveat, however, to the Seventh Circuit’s rule. The court acknowledged that, in certain lines of employment, wage patterns could be discriminatory, but the court also noted how this must be proved and not assumed.⁷⁰ Where an employee has been discriminated against in a prior job in violation of the EPA, relying on those wages to determine a new salary would perpetuate said discrimination in violation of the EPA.⁷¹ Absent evidence that plaintiff’s prior job engaged in wage discrimination in violation of the EPA, defendants’ reliance on that prior wage history was proper, and the court held the defendants were entitled to summary judgment.⁷² The Seventh Circuit, unlike all of the cases mentioned above, grants the most deference to an employer’s use of prior salary history as a “factor other than sex.”

III. THE LAWS FROM VARYING CITIES AND STATES

Given the varying approaches taken by the federal circuits regarding prior salary history as a “factor other than sex” under the EPA in conjunction with the fact that all circuits accept prior salary history as a factor to some degree,⁷³ cities and states across the country have simplified the analysis by removing prior salary history as a factor altogether.

A. *The Massachusetts Law*

The Massachusetts law is intended to close the wage gap between the genders, with a focus on the phenomenon that lower wages and salaries of women follow them throughout their careers.⁷⁴ The governor signed the bill into law on August 1, 2016, and took effect July 2018.⁷⁵ It also bears

⁶⁷ *Id.*

⁶⁸ *Id.* at 468–69.

⁶⁹ *Id.* at 469.

⁷⁰ *Wernsing*, 427 F.3d at 470.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See supra* Part II.

⁷⁴ Stacy Cowley, *Illegal in Massachusetts: Asking Your Salary in a Job Interview*, N.Y. TIMES (Aug. 2, 2016), <https://www.nytimes.com/2016/08/03/business/dealbook/wage-gap-massachusetts-law-salary-history.html>.

⁷⁵ *Id.*

mentioning that this new Massachusetts law includes a codification of Section 206(d) of the FLSA as amended by the EPA, but noticeably absent in the enumerated exceptions is the broad “factor other than sex” language of the EPA.⁷⁶

As an initial matter, the law prohibits an employer from seeking an applicant’s prior salary history from the applicant’s current or former employer.⁷⁷ Once the employer has extended an employment offer, including compensation, to the applicant, however, said applicant can give written authorization to the employer to confirm prior salary history with prior employers.⁷⁸ The Massachusetts law makes it unlawful for an employer to prohibit an employee from discussing either the employee’s own, or another employee’s, wages as a condition of employment.⁷⁹ The employer also may not screen applicants by setting a minimum or maximum criteria that the applicant’s prior salary or compensation history must satisfy; nor may the employer condition being granted an interview or continued consideration for an offer of employment on the applicant’s disclosure of prior salary history.⁸⁰ Lastly, the law forbids an employer from firing or otherwise retaliating against an employee because the employee: (1) resisted any action by the employer prohibited under this new law; (2) already did or is about to complain or institute a proceeding against the employer for violating any of the above-mentioned prohibitions; (3) testified or is about to testify or otherwise assist an investigation into violations of the law; or (4) revealed the employee’s own salary information or asked about another employee’s salary.⁸¹

The Massachusetts law does grant a degree of reprieve with a safe harbor provision, however, for any employer charged with gender-based wage discrimination.⁸² It appears, however, that this safe harbor does not apply where the employer violates the prohibitions on seeking prior salary history.⁸³ Provided the employer demonstrates that within the last three years the employer had performed a pay practice self-evaluation and has made reasonable progress towards eliminating gender-based pay differentials, the employer has an affirmative defense.⁸⁴ The employer can design this self-evaluation, but the evaluation must be reasonable in detail

⁷⁶ Compare MASS. GEN. LAWS ch. 149, § 105A(b) (2016), with Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, and 29 U.S.C. § 206(d)(1) (2018).

⁷⁷ § 105A(c)(2).

⁷⁸ *Id.*

⁷⁹ *Id.* § 105A(c)(1).

⁸⁰ *Id.* § 105A(c)(2).

⁸¹ *Id.* § 105A(c)(3).

⁸² *Id.* § 105A(d).

⁸³ See § 105A(d).

⁸⁴ *Id.*

2019]

COMMENT

421

and scope relative to the employer's size or consistent with the attorney general's standard templates or forms.⁸⁵ It is important to note that this safe harbor provision does not apply to an alleged violation of Massachusetts's general gender-based wage discrimination law if the alleged violation occurred prior to the completion of the self-evaluation or six months thereafter.⁸⁶ Simplified, Massachusetts's law prohibits employers from conditioning employment on an applicant's disclosure of prior salary history, seeking such salary history information without the consent of the applicant or prior to offering an employment opportunity with compensation, or retaliating against any employee or applicant that opposes such illegal practices.⁸⁷

B. *The Philadelphia Law*

Philadelphia enacted its own prohibition against employers requiring applicants to disclose prior salary history, signed into law by the mayor on January 23, 2017, intended to be effective 120 days later on May 23, 2017.⁸⁸ In its findings, the Philadelphia City Council stated: (1) that the gender wage gap still exists in the United States; (2) that this gap has narrowed only by less than half a penny per year since 1963 when the EPA was passed; (3) basing a worker's current wages or salary on prior salary history only perpetuates the gender wage disparity; and (4) salary offers should not be based on prior salary history.⁸⁹

In order to combat the above-mentioned issues, the Philadelphia law makes it unlawful for an employer to: (1) inquire into an applicant's salary history; (2) require the applicant to disclose prior salary history; (3) condition employment or consideration for an interview or employment on the applicant disclosing such information; or (4) retaliate against an applicant for refusing to comply with or opposing such salary history inquiries.⁹⁰ These prohibitions mirror those of the Massachusetts law described above.⁹¹ Unlike Massachusetts, however, Philadelphia imposes an additional restriction that states an employer cannot rely on salary history at *any stage* in the employment process, such as in negotiating or drafting a contract.⁹² The employer may rely on such information provided that the applicant

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* § 105A(c)(1)–(4).

⁸⁸ Phila., Pa., Ordinance 160840, § 2 (Jan. 23, 2017).

⁸⁹ PHILA., PA., CODE § 9-1131(1) (2017).

⁹⁰ *Id.* § 9-1131(2)(a)(i).

⁹¹ *See supra* Part III.A.

⁹² § 9-1131(2)(a)(ii).

“knowingly and willing disclosed his or her wage history to the employer.”⁹³ None of these provisions apply to employers following state, federal or local law specifically permitting disclosure or verification of wage history for employment purposes, however.⁹⁴ Absent from the Philadelphia law is a safe harbor provision as found in the Massachusetts law,⁹⁵ and the Philadelphia statute does not include a provision permitting an employer to seek the applicant’s prior salary history after an offer of employment has been negotiated and extended to the applicant like in Massachusetts and Delaware.⁹⁶

The Philadelphia law imposes the same general prohibitions on an employer requiring an applicant to disclose prior salary history or conditioning consideration for employment on such disclosure, seeking such information from current or prior employers, and prohibiting retaliation against applicants who resist.⁹⁷ Philadelphia goes further though, prohibiting an employer from relying on prior salary history unless the applicant reveals such information knowingly and willingly.⁹⁸

C. *The New York City Law*

New York City enacted its prohibition against salary history inquiries when the mayor signed it on May 5, 2017, with the effective date being October 31, 2017.⁹⁹ The law makes it unlawful for an employer to “inquire about the salary history of an applicant for employment.”¹⁰⁰ “Inquire” means any type of question or statement to the applicant, the applicant’s current or prior employer, or a current or former agent or employee of such employer in any method for the applicant’s salary history.¹⁰¹ The inquiry definition also extends to searching publicly available records for such information.¹⁰²

Similar to Philadelphia, New York City also prohibits an employer from relying on prior salary history for determining salary, benefits, or other compensation to offer to an applicant at any stage of the hiring process.¹⁰³ If an applicant, without prompting, voluntarily discloses prior salary history to

⁹³ *Id.*

⁹⁴ *Id.* § 9-1131(2)(b).

⁹⁵ Compare *id.* § 9-1131, with MASS. GEN. LAWS. ch. 149, § 105A(d) (2016).

⁹⁶ Compare § 9-1131, with *supra* Part III.A., and *infra* Part III.D.

⁹⁷ § 9-1131(2)(a)(i)–(ii).

⁹⁸ *Id.* § 9-1131(2)(a)(ii).

⁹⁹ Brie Kluytenaar, *Update on New York City Legislation Limiting Salary History Inquiries*, NAT’L L. REV. (May 10, 2017), <https://www.natlawreview.com/article/update-new-york-city-legislation-limiting-salary-history-inquiries>.

¹⁰⁰ N.Y.C., N.Y., ADMIN. CODE § 8-107(25)(b)(1) (2017).

¹⁰¹ *Id.* § 8-107(25)(a).

¹⁰² *Id.*

¹⁰³ *Id.* § 8-107(25)(b)(2).

2019]

COMMENT

423

an employer, its employee or agent, or an employment agent, the prospective employer is free to rely on such information.¹⁰⁴ Furthermore, an employer may discuss with an applicant the applicant's expectations as to salary, benefits, and other compensation, provided there is no inquiry into prior salary history.¹⁰⁵

Additionally, like Philadelphia, the law does not apply where federal, state, or local law requires disclosure of such salary history.¹⁰⁶ The New York City law, however, also exempts internal transfers and promotions and public employee positions where salary is guided by collective bargaining procedures.¹⁰⁷ Lastly, where an employer seeks to verify non-salary-related information or conduct a background check and discovers salary-related information, the employer has not violated the law but still may not rely on such information in determining an applicant's offered salary.¹⁰⁸

New York City's prohibition against salary history inquiries generally mirrors that of Philadelphia on what employer actions are prohibited, but also seems to provide more protections for employers, mainly in allowing discussions about salary expectations¹⁰⁹ and shielding the employer for accidental salary history discoveries.¹¹⁰

D. *The Delaware Law*

When signing the salary history ban into law, Delaware Governor John Carney was quoted as saying: “[a]ll Delawareans should expect to be compensated equally for performing the same work . . . [t]his new law will help guarantee that across our state, and address a persistent wage gap between men and women.”¹¹¹ The law went into effect on December 14, 2017.¹¹² Like Massachusetts,¹¹³ Delaware prohibits an employer or an employer's agent from screening applicants based on prior salary history, including requiring prior salary to satisfy either a minimum or maximum

¹⁰⁴ *Id.* § 8-107(25)(d).

¹⁰⁵ *Id.* § 8-107(25)(c).

¹⁰⁶ § 8-107(25)(e)(1).

¹⁰⁷ *Id.* § 8-107(25)(e)(2), (4). “Collective bargaining” is defined as “[n]egotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits.” *Collective Bargaining*, BLACK'S LAW DICTIONARY (5th Pocket ed. 2016).

¹⁰⁸ § 8-107(25)(e)(3).

¹⁰⁹ *Id.* § 8-107 (25)(c).

¹¹⁰ *Id.* § 8-107(25)(e)(3).

¹¹¹ Alex Vuocolo, *Delaware First State to Enact Salary History Ban*, DEL. BUS. TIMES (Jun. 15, 2017), <http://www.delawarebusinesstimes.com/delaware-first-state-enact-salary-history-ban/>.

¹¹² DEL. CODE ANN. tit. 19, § 709B (2017).

¹¹³ *See supra* Part III.A.

criteria.¹¹⁴ The employer also may not “[s]eek the compensation history of an applicant from the applicant or a current or former employer.”¹¹⁵ Similar to New York City,¹¹⁶ however, an employer may still discuss and negotiate expected compensation with the applicant, provided that there is no request or requirement for the applicant’s compensation history.¹¹⁷ Furthermore, similar to Massachusetts,¹¹⁸ an employer can seek an applicant’s salary history after an employment offer that includes compensation has been extended to the applicant; but differing from Massachusetts, this offer must also be *accepted*.¹¹⁹ This inquiry is solely for confirming the applicant’s prior salary history.¹²⁰

It is important to note that the Delaware law is certainly the barest, least descriptive of the laws enacting prohibitions on salary history inquiries described in this Comment.¹²¹ This could cause problems for employers, uncertain of what exactly is prohibited and what is allowed. Regardless, the Delaware law does what every other law described in this Comment does: prohibits employers from inquiring into the salary history of an applicant while granting an employer flexibility to make a competitive offer to that applicant.¹²²

E. *The Oregon Law*

Oregon’s ban on seeking prior salary history went into effect in October 2017; however, civil actions against employers who violate this law are not permitted until January 2024.¹²³ Oregon, in its laws prohibiting salary history inquiries, also includes a codification of Section 206(d)(1) of the FLSA.¹²⁴ Oregon’s codification includes a number of exceptions justifying pay disparities between employees of different genders, but, as seen in Massachusetts, the catch-all “factor other than sex” language has been removed.¹²⁵ The absence of this catch-all language is telling—had

¹¹⁴ § 709B(b)(1).

¹¹⁵ *Id.* § 709B(b)(2).

¹¹⁶ *See supra* Part III.C.

¹¹⁷ § 709B(d).

¹¹⁸ *See supra* Part III.A.

¹¹⁹ § 709B(e).

¹²⁰ *Id.*

¹²¹ *Compare id.* § 709(B), with MASS. GEN. LAWS. ch. 149, § 105A (2016), and PHILA., PA., CODE § 9-1131 (2017), and N.Y.C., N.Y., ADMIN. CODE § 8-107(25) (2017), and OR. REV. STAT. § 652.220 (2017), and S.F., CAL., MUN. CODE § 3300J (2017).

¹²² § 709(B).

¹²³ Mark A. Crabtree & Claudia A. Halasz, *Oregon Enacts Expansive Pay Equity Law*, NAT’L L. REV. (Jun. 16, 2017), <https://www.natlawreview.com/article/oregon-enacts-expansive-pay-equity-law>.

¹²⁴ § 652.220(2).

¹²⁵ *Compare id.*, with § 105A(b), and Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat.

2019]

COMMENT

425

Massachusetts or Oregon desired the “factor other than sex” language, it would have been included.

Turning to the enactments specific to salary history, Oregon has made it unlawful for an employer to “[s]creen job applicants based on current or past compensation.”¹²⁶ While not explicitly stated, this condition certainly includes the minimum-maximum criteria element already seen in Massachusetts and Delaware.¹²⁷ The law also forbids an employer from using current or past compensation as a factor in determining the compensation offered to a prospective employee.¹²⁸ This prohibition, however, does not apply to an employer when a current employee is considered for a transfer, move, or hire to a new position with that same employer.¹²⁹ Furthermore, under chapter 659A of the Oregon Revised Statute, an employer cannot seek an applicant’s prior salary history from the applicant or the applicant’s current or former employer.¹³⁰ Once the employer has extended an employment offer that includes the amount of compensation, an employer can request written authorization from the applicant to confirm his or her prior salary history.¹³¹ This provision is in line with what Massachusetts and Delaware require.¹³²

Oregon, like Massachusetts, also offers a safe harbor provision in its law that alleviates an employer from liability under certain conditions; yet, unlike Massachusetts, this safe harbor appears to *not* apply to violations of the prohibition against salary history inquiry.¹³³ The employer will be neither liable for compensatory nor for punitive damages if, within three years, the employer conducted a good-faith equal-pay analysis that was reasonable in detail and scope according to the size of the employer and related to the protected class in the suit.¹³⁴ The wage disparity must also have been eliminated for the specific plaintiff, and the employer must have taken reasonable and substantial steps to eliminate the wage disparity for the protected class overall.¹³⁵

56., and 29 U.S.C. § 206(d)(1) (1963).

¹²⁶ § 652.220(1)(c).

¹²⁷ See *supra* Parts III.A, D.

¹²⁸ § 652.220(1)(d).

¹²⁹ *Id.*

¹³⁰ *Id.* § 659A; H.R. 2005, 79th Leg. Assemb., Reg. Sess., § 4 (Or. 2017).

¹³¹ *Id.*

¹³² See MASS. GEN. LAWS ch. 149, § 105A(c)(3) (2017); DEL. CODE ANN. tit. 19, § 709(B)(b)(2) (2017); *id.* § 709(B)(e). Note that Delaware also requires the offer to be accepted.

¹³³ Compare Or. H.R. 2005 § 12, with § 105A(d).

¹³⁴ § 12(1)(a)(A)–(B).

¹³⁵ *Id.* § 12(b).

Oregon is prohibiting employers from screening applicants based on prior salary and using prior salary in determining how much to offer an applicant,¹³⁶ as well as seeking this information from the applicant or the applicant's current or former employer.¹³⁷ But the employer also has a degree of leeway; an employer is allowed to confirm prior salary after extending a job offer which includes compensation,¹³⁸ and the employer is protected by a safe harbor provision.¹³⁹

F. *The San Francisco Law*

In almost identical language to the Philadelphia law, the San Francisco City Council found that: (1) women in San Francisco suffer from a gender wage gap; (2) the gender wage gap has narrowed less than half a penny per year since the 1963 enactment of the EPA; (3) seeking prior salary history contributes to the wage gap by perpetuating wage inequalities; (4) women are put at a disadvantage in negotiating salary when required to disclose prior salary history; (5) prior salary history is unlikely to not be a factor in negotiating or setting a salary offer when an employer is able to ask such information; (6) the new law will ensure that a woman's prior wages will not weigh down her earnings throughout her career; and (7) the new law will ensure employees and employers negotiate salaries based on qualifications rather than prior salary history.¹⁴⁰

Turning to the law itself, an employer is prohibited from inquiring into an applicant's prior salary history.¹⁴¹ In this context, "inquire" means any direct or indirect form of communication in any type of attempt to gather this information from or about the applicant.¹⁴² Further, an employer cannot consider an applicant's prior salary history in determining what salary to offer, *regardless* of whether the applicant discloses the prior salary history voluntarily.¹⁴³ This is a sharp deviation from the exceptions included in both the Philadelphia and New York City laws.¹⁴⁴ Also, San Francisco, as displayed in previously discussed laws, prohibits an employer from refusing to hire or in any other way retaliating against an applicant for refusing to disclose prior salary history.¹⁴⁵

¹³⁶ OR. REV. STAT. § 652.220(1)(c)–(d) (2017).

¹³⁷ *Id.* § 659A; Or. H.R. 2005 § 4.

¹³⁸ *Id.*

¹³⁹ Or. H.R. 2005 § 12.

¹⁴⁰ S.F., CAL., MUN. CODE § 3300J.2(a)–(d), (l)–(m) (2017).

¹⁴¹ *Id.* § 3300J.4(a).

¹⁴² *Id.* § 3300J.3.

¹⁴³ *Id.* § 3300J.4(b).

¹⁴⁴ Compare *id.*, with PHILA., PA., CODE § 9-1131(2)(a)(ii) (2017), and N.Y.C., N.Y., ADMIN. CODE § 8-107(25)(d) (2017).

¹⁴⁵ § 3300J.4(c).

2019]

COMMENT

427

In another unique feature of the law, San Francisco also imposes liability on current and former employers—current or former employers cannot release the salary history of a current or former employee to said employee’s current or prospective employer without written authorization from the employee.¹⁴⁶ Only San Francisco imposes such a restriction on current or previous employers.¹⁴⁷ Lastly, an applicant can voluntarily disclose his or her prior salary history after an employer makes an initial salary offer to negotiate a different salary.¹⁴⁸ Only then may an employer use such a disclosure as it strictly relates to making a counter-offer.¹⁴⁹ While San Francisco imposes many of the provisions already enacted by other cities and states, it is certainly the strictest, most pro-employee of the laws in light of two key provisions: first, the provision that prohibits an employer from considering prior salary history after an applicant makes a voluntary disclosure, and second, the provision that imposes liability on an employer revealing the information, instead of just on the employer seeking the information.

G. *The California Law*

California introduced a bill intending to narrow the gender wage gap by prohibiting employers from asking about prior salary history.¹⁵⁰ It was unclear whether it would be signed into law, however, as the Governor of California, Jerry Brown, had vetoed a bill implementing the same laws two years earlier after being pressured by business groups.¹⁵¹ At the time, the governor was quoted as saying that the law prevented employers “from obtaining relevant information with little evidence that this would assure more equitable wages.”¹⁵² The measure in 2015, however, had no G.O.P. support and received not one G.O.P. vote, whereas the more recent bill was co-authored by two Republicans and the bill garnered ten G.O.P. votes.¹⁵³ The 2017 bill did have opposition from powerful business groups, as the Chamber of Commerce gathered together an extensive coalition of detractors.¹⁵⁴

¹⁴⁶ *Id.* § 3300J.4(d).

¹⁴⁷ *See supra* Parts III.A–E.

¹⁴⁸ § 3300J.4(e).

¹⁴⁹ *Id.*

¹⁵⁰ Margot Roosevelt, *Previous Salary? Soon, the Question Might Be Illegal in California*, MERCURY NEWS (Sept. 11, 2017), <http://www.mercurynews.com/2017/09/11/previous-salary-soon-the-question-might-be-illegal/>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

The Governor signed the bill into law on October 12, 2017.¹⁵⁵ An employer is now prohibited from relying on an applicant's salary history as a factor for deciding whether to offer the applicant a job or how much to pay.¹⁵⁶ The employer also may not seek such salary history information—whether it be oral or in writing—in person or through an agent, of an applicant.¹⁵⁷ An applicant may voluntarily disclose his or her salary history information, and once an applicant does so, an employer is free to consider and rely on that information for determining an applicant's offered salary.¹⁵⁸ These prohibitions will not apply to any salary history information that is disclosable according to state or federal law,¹⁵⁹ but are enforceable against “all employers, including state and local government employers and the Legislature.”¹⁶⁰ The bill went into effect on January 1, 2018.¹⁶¹

IV. THE BACKLASH, IMPLICATIONS, AND OUTLOOK IN THE WAKE OF THESE LAWS

A. *The Legal Backlash*

These laws have faced backlash, however, including the Philadelphia ordinance that is now being challenged in court; the Chamber of Commerce of Greater Philadelphia¹⁶² has brought suit to strike down the ordinance.¹⁶³ Experts believe this suit “may set the tone for future litigation over pay-history laws elsewhere.”¹⁶⁴

¹⁵⁵ Margot Roosevelt, *California Bosses Can No Longer Ask You About Your Previous Salary*, ORANGE COUNTY REG. (Oct. 13, 2017), <http://www.ocregister.com/2017/10/12/in-bid-to-fight-gender-pay-gap-gov-jerry-brown-signs-salary-privacy-law/>.

¹⁵⁶ CAL. LAB. CODE § 432.3(a) (West 2017) (amended 2018).

¹⁵⁷ *Id.* § 432.3(b).

¹⁵⁸ *Id.* § 432.3(g)–(h).

¹⁵⁹ *Id.* § 432.3(e).

¹⁶⁰ *Id.* § 432.3(f).

¹⁶¹ David Lazarus, *From Weed to Wages, the New Year Ushers in New Laws Affecting Consumers*, L.A. TIMES (Jan. 2, 2018, 3:00 AM), <http://www.latimes.com/business/lazarus/la-fi-lazarus-new-california-laws-20180102-story.html>.

¹⁶² A chamber of commerce is an association of businesses for a geographic area that seeks to further the collective interests of the group. *What Is a Chamber*, ASS'N OF CHAMBER OF COMM. EXECUTIVES, <https://secure.acce.org/whatisachamber/> (last visited Dec. 17, 2018). Business owners voluntarily form these associations in order to advocate for economic growth and business interests. *Id.*

¹⁶³ Dan Packel, *Pay Inquiry Bans to Get Crucial First Test in Philly*, LAW360 (Apr. 10, 2017), <https://advance.lexis.com/document/?pdmfid=1000516&crd=45714273-4743-4850-9fe1-b40c4bc8aa5a&pdworkfolderid=b41c96b8-1a14-4743-adb1-bcacd81ec3f8&ecomp=txptk&earg=b41c96b8-1a14-4743-adb1-bcacd81ec3f8&prid=ec5d1f6e-79b0-4046-99fe-879eba00ef0c>.

¹⁶⁴ *Id.*

In its complaint, the Chamber stated that rather than achieve gender wage equality, the law “will chill the protected speech of employers and immeasurably complicate their task of making informed hiring decisions.”¹⁶⁵ The Chamber, in its main argument, asserted that the ordinance violates employers’ First Amendment rights to free speech because it is both over- and under-inclusive,¹⁶⁶ and that the ordinance violates both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause.¹⁶⁷ As to the First Amendment, the Chamber alleges that the ordinance imposes both content-based and speaker-based restrictions on employers’ speech because employers, and only employers, are prohibited from asking about prior salary history.¹⁶⁸ Also, prohibiting employers from seeking such information is a content-based restriction on employers’ speech, which can only withstand strict scrutiny when the restriction serves a compelling state interest.¹⁶⁹ The Chamber alleges the law serves no compelling interest because while Philadelphia has a compelling interest in eliminating pay disparities based on gender discrimination, that interest does not extend to wage differences based on factors such as skill or training, which the Chamber believes the new law covers.¹⁷⁰ The complaint further alleges that the ordinance violates the Due Process Clause because the ordinance is impermissibly vague by failing to define key terms;¹⁷¹ and it violates the Commerce Clause because the law extends to any employer that either employs at least one employee or transacts business in Philadelphia, even if that employer is in another state.¹⁷² Based on these allegations, the Chamber has requested preliminary and permanent injunctions to prevent Philadelphia from enforcing the ordinance.¹⁷³

After receiving the Chamber’s complaint, on April 19, 2017, the judge stayed the effective date of the ordinance pending the outcome of the Chamber’s motion for a preliminary injunction.¹⁷⁴ In order to avoid confusion, the city agreed to the stay for employers and employees as the

¹⁶⁵ Complaint at 2, Chamber of Commerce for Greater Phila. v. City of Phila., No. 17-1548 (E.D. Pa. Apr. 3, 2017).

¹⁶⁶ *Id.* at 4–5.

¹⁶⁷ *Id.* at 5–6.

¹⁶⁸ *Id.* at 13.

¹⁶⁹ *Id.* at 14.

¹⁷⁰ *Id.* at 15.

¹⁷¹ Complaint at 17, Chamber of Commerce for Greater Phila. v. City of Phila., No. 17-1548 (E.D. Pa. Apr. 3, 2017).

¹⁷² *Id.* at 19–20.

¹⁷³ *Id.* at 27.

¹⁷⁴ Michael Tanenbaum, *Philly Salary History Bill Put on Hold Amid Legal Challenge*, PHILLY VOICE (Apr. 24, 2017), <http://www.phillyvoice.com/philly-wage-equity-bill-put-hold-amid-legal-challenge/>. The effective date of the ordinance was May 23, 2017. *Id.*

legal process moved forward.¹⁷⁵ On May 30, 2017, however, Judge Mitchell S. Goldberg, presiding over this litigation, found that the Chamber of Commerce failed to demonstrate with specific facts that one or more of its members will be directly affected by Philadelphia's ordinance so as to establish standing.¹⁷⁶ Without such facts, the court cannot determine whether any of the individual members would have standing to bring suit; because the Chamber could not show that at least one of its members would have standing to sue, the Chamber itself does not have standing to sue, and the judge granted the City's motion to dismiss.¹⁷⁷ The matter was dismissed, however, without prejudice, and the Chamber was granted leave to amend its complaint within fourteen days of the order.¹⁷⁸

On June 13, 2017, the Chamber filed its amended complaint, alleging the same constitutional violations as before; however, this time the amended complaint included an extensive outline of the ways that the ordinance will harm certain particular enumerated members as exemplars for the group as a whole.¹⁷⁹ Philadelphia did not file a motion to dismiss the amended complaint, so this lawsuit will be decided on the merits.¹⁸⁰

On April 30, 2018, the district court ruled on the Chamber's motion for a preliminary injunction.¹⁸¹ The court bifurcated its decision, analyzing the ordinance in two parts: the "Inquiry Provision" that prohibits an employer from asking about prior salary history and the "Reliance Provision" that prohibits an employer from relying on prior salary history in setting current salary.¹⁸² In determining the Chamber's likelihood of success on the merits of its constitutional challenge, the district court ruled that, since an inquiry into prior salary history occurs in the context of a job negotiation, the Inquiry Provision regulates commercial speech.¹⁸³ Finding a law regulates commercial speech is critical because commercial speech receives less protection from regulation and laws regulating such speech are analyzed

¹⁷⁵ *Id.*

¹⁷⁶ Order, Chamber of Commerce for Greater Phila. v. City of Phila., No. 17-1548 (E.D. Pa. May 30, 2017) (granting the City's motion to dismiss).

¹⁷⁷ *Id.* at 9–10.

¹⁷⁸ *Id.* at 10.

¹⁷⁹ Amended Complaint at 14–22, Chamber of Commerce for Greater Phila. v. City of Phila., No. 17-1548 (E.D. Pa. June 13, 2017).

¹⁸⁰ Stephanie J. Peet & Timothy M. McCarthy, *Philadelphia's Wage-History Ordinance Faces First Amendment Challenge*, WASH. LEGAL FOUND. (Jul. 21, 2017), <https://wfllegalpulse.com/2017/07/21/philadelphias-wage-history-ordinance-faces-first-amendment-challenge/>.

¹⁸¹ See Chamber of Commerce for Greater Phila. v. City of Phila., 319 F. Supp. 3d 773 (E.D. Pa. 2018).

¹⁸² See *id.* at 782.

¹⁸³ *Id.* at 783–84.

under an intermediate scrutiny standard.¹⁸⁴ The intermediate scrutiny test for commercial speech is as follows: is the regulated speech unlawful or misleading?¹⁸⁵ If not, the next question is whether the government's asserted interest is substantial.¹⁸⁶ If yes, the court asks whether the regulation directly advances the government's asserted interest and whether the regulation is at least extensive as necessary to serve that interest.¹⁸⁷

As to the case at bar, the district court found that inquiring into prior salary history is not unlawful nor is it misleading, and as such the Inquiry Provision does not regulate unlawful or misleading speech.¹⁸⁸ Both parties agreed that the City had a substantial interest in promoting wage equality and reducing the prevalence of discriminatory wage disparities.¹⁸⁹ Analyzing whether the ordinance directly advances the City's asserted interest, the district court noted that the Supreme Court emphasized that this prong could not be satisfied with mere speculation or conjecture, but must show that the harms sought to be avoided are real and the regulation will reduce them to a material degree.¹⁹⁰ The district court concluded there was insufficient evidence establishing discriminatory wages being perpetuated in subsequent wages contributing to a discriminatory wage gap.¹⁹¹ Lacking such evidence, the court found that it was "impossible" to ascertain whether the Inquiry Provision would directly advance the City's substantial interest of reducing discriminatory wage disparities and achieving wage equality.¹⁹² As a result, the court ruled that the Inquiry Provision violated the First Amendment such that the Chamber was likely to succeed on the merits as to its constitutional challenge to the Inquiry Provision.¹⁹³

For the Reliance Provision, however, the district court held that relying on salary history to set new salaries does not involve speech and therefore the Chamber could not demonstrate a likelihood of success on the merits that the Reliance Provision violates the First Amendment.¹⁹⁴ Furthermore, the court found that the ordinance was not unconstitutionally vague nor was the scope of the ordinance beyond the territory of Philadelphia such that the ordinance would violate the United States or Pennsylvania Constitutions.¹⁹⁵

¹⁸⁴ *See id.* at 784.

¹⁸⁵ *Id.* at 785.

¹⁸⁶ *Id.*

¹⁸⁷ *Chamber of Commerce*, 319 F. Supp. 3d at 785.

¹⁸⁸ *Id.* at 787.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 793.

¹⁹¹ *Id.* at 800.

¹⁹² *Id.*

¹⁹³ *Chamber of Commerce*, 319 F. Supp. 3d at 800.

¹⁹⁴ *Id.* at 804.

¹⁹⁵ *Id.* at 805–06.

As to the remaining prongs of the preliminary injunction test, the court found the Chamber could not show irreparable harm from the Reliance Provision because it would not be able to show that the Reliance Provision was unconstitutional.¹⁹⁶ Since the Chamber showed a real and actual deprivation of First Amendment rights under the Inquiry Provision, however, the Chamber demonstrated irreparable harm from the Inquiry Provision.¹⁹⁷ The City of Philadelphia could not show irreparable harm because it could not “claim a legitimate interest in enforcing an unconstitutional law” and upholding freedoms under the First Amendment outweighed any harm the City may experience under the preliminary injunction.¹⁹⁸ Lastly, since a great weight of precedent exists stating that “there is a significant public interest in upholding First Amendment principles,” the district court found that granting the preliminary injunction was in the public interest.¹⁹⁹

Based on the above analysis, the district court concluded that the Inquiry Provision violated the First Amendment and granted the Chamber’s preliminary injunction but the Reliance Provision did not violate the First Amendment and therefore would remain intact.²⁰⁰ This decision, however, effectively renders the Reliance Provision useless because if an employer can ask about prior salary history, it will be near impossible for an applicant to prove that the employer secretly relied on that information in setting the current salary. Both parties appealed the decision to the U.S. Court of Appeals for the Third Circuit.²⁰¹ Being a case of first impression, the final result of this lawsuit could resonate throughout the country with other state and city legislatures enacting, or considering enacting, other similar salary-history bans.²⁰²

B. *The Legislative Pushback*

1. The Illinois Veto

Rather than enact legislation similar to the ones seen above,²⁰³ the Governor of Illinois vetoed a bill that would prohibit employers from asking about an applicant’s prior salary history.²⁰⁴ The Governor stated his support

¹⁹⁶ *Id.* at 806.

¹⁹⁷ *Id.* at 807.

¹⁹⁸ *Id.*

¹⁹⁹ *Chamber of Commerce*, 319 F. Supp. 3d at 808.

²⁰⁰ *Id.* at 812.

²⁰¹ Amanda E. Steinke, *Constitutionality of Philadelphia’s Salary History Ban Appealed to Third Circuit*, NAT’L L. REV. (June 12, 2018), <https://www.natlawreview.com/article/constitutionality-philadelphia-s-salary-history-ban-appealed-to-third-circuit>.

²⁰² Peet & McCarthy, *supra* note 180.

²⁰³ *See supra* Part III.

²⁰⁴ Alexia Elejalde-Ruiz, *Rauner Vetoes Bill That Would Bar Employers from Asking*

for eliminating the gender wage gap, but suggested a bill more closely modeled after the Massachusetts law that would provide employers with more leeway.²⁰⁵ The Illinois bill did not include the caveat, as found in the Massachusetts bill, that an employer could seek prior salary history after offering a candidate the job with a salary.²⁰⁶ There was disappointment in the Governor vetoing the bill, but the indication that the Governor recognizes the existence of a gender wage gap and that a prohibition on asking about prior salary history could eliminate it is encouraging to supporters of the bill.²⁰⁷

Instead of re-working the bill, those in favor of the bill planned to override the Governor's veto legislatively in the November veto session.²⁰⁸ The initial bill passed in the House by a vote of 91-24 and passed in the Senate by a vote of 35-18 (with one member voting "present").²⁰⁹ The override requires seventy-one votes in the House and thirty-six votes in the Senate, and a Republican representative expressed his optimistic belief that the override effort will be successful due to the bill's strong bi-partisan support.²¹⁰ On November 9, 2017, however, when the Illinois Senate attempted to override Governor Rauner's veto, it failed to do so.²¹¹ The Illinois House had successfully overridden the veto 80-33, but the Illinois Senate vote, needing three-fifths of members (thirty-six members) to vote in favor of the override, only garnered twenty-nine "yeas," seventeen "nays," and one "present."²¹² At this point, it is unclear what will happen in Illinois regarding a prohibition against salary history inquiries, but the attempt to enact such legislation signals the growing desire for such prohibitions.

2. The New Jersey Veto

In the summer of 2017, the New Jersey Legislature put forward an amendment to the New Jersey Law Against Discrimination (NJLAD) that would have enacted similar salary history bans as seen above.²¹³ The law

About Salary History, CHI. TRIB. (Aug. 28, 2017, 4:23 PM), <http://www.chicagotribune.com/business/ct-illinois-no-salary-history-bill-veto-0829-biz-20170828-story.html>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Elejalde-Ruiz, *supra* note 204.

²¹¹ L. Robert Batterman, Emilie Adams & Alex C. Weinstein, *Illinois Senate Fails to Override Governor's Veto of Salary History Ban*, NAT'L L. REV. (Nov. 16, 2017), <https://www.natlawreview.com/article/illinois-senate-fails-to-override-governor-s-veto-salary-history-ban>.

²¹² *Id.*

²¹³ Micala Campbell Robinson, *A Woman's Worth: Closing the Gender Pay Gap*, N.J. L.J., (Aug. 21, 2017, 3:52 PM), <https://advance.lexis.com/document/?pdmfid=1000516&crld>

would have prohibited employers from: (1) inquiring about an applicant's compensation and benefit history at any point during the hiring process; (2) screening a candidate based on his or her prior salary or benefits history; (3) using that prior salary history to make pay determinations; and (4) retaliating against an employee who shared terms and conditions of employment, like compensation, with other current or former employees.²¹⁴ A candidate could volunteer prior salary history, at which point the employer could verify the information, provided that there was no employer coercion and the candidate gave written authorization for the inquiry.²¹⁵

Chris Christie, then-Governor of New Jersey, vetoed this bill on July 25, 2017 because he felt that the law would punish inquiries made without discriminatory intent or impact in contradiction to the NJLAD.²¹⁶ Governor Christie indicated receptiveness to consider a bill that would protect against wage discrimination without being hostile to business.²¹⁷ There was an expectation that once Governor Christie was out of office in early 2018, the legislature would again introduce the same or a similar bill.²¹⁸ Phil Murphy, a Democrat, defeated Republican Kim Guadagno in the New Jersey gubernatorial election and took office January 16, 2018.²¹⁹ Governor Murphy has pledged to sign pay-equity legislation into law, nearly assuring that New Jersey will have new pay-equity laws, although the specifics of such legislation are not known.²²⁰

3. The Michigan Preemption

On March 26, 2018, the governor of Michigan, Rick Snyder, signed into law a bill that prohibits local governments and municipalities from regulating employers' questions for applicants during interviews.²²¹ This bill

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-79b0-4046-99fe-879eba00ef0c.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Sean D. Dias, *New Jersey Employers Get Reprieve from Salary History Ban*, SCARINCI HOLLENBECK (Aug. 17, 2017), <https://scarincihollenbeck.com/law-firm-insights/labor-employment/salary-history-bill-vetoed/>.

²¹⁹ Brent Johnson & Susan K. Livio, *Next Up for Phil Murphy: His Transition to Power. Here's How It Works*, NJ.COM (Nov. 8, 2017), https://www.nj.com/politics/index.ssf/2017/11/next_up_for_murphy_his_transition_to_power_heres_h.html.

²²⁰ Suzanne Herrmann Brock, Elizabeth Cowit & Brittany E. Grierson, *The Push for Pay Equity Legislation in New Jersey*, N.J. L.J. (Dec. 4, 2017, 12:16 PM), <https://www.law.com/njlawjournal/sites/njlawjournal/2017/12/04/the-push-for-pay-equity-legislation-in-new-jersey/>.

²²¹ Stacey A. Bastone & K. Joy Chin, *A Ban on Salary History Bans: Michigan Bars Local Governments from Prohibiting Such Inquiries*, NAT'L L. REV. (Mar. 29, 2018),

2019]

COMMENT

435

amended a law from 2015 prohibiting local governments from banning salary history inquiries entirely.²²² The law is seen as a clear measure to block cities and municipalities from banning salary history inquiries, despite the fact that at the time of signing, no municipality had proposed such an ordinance.²²³

C. *What's on the Horizon?*

New York City Public Advocate Letitia James expects a legal challenge from business groups like what occurred in Philadelphia.²²⁴ James expects litigation because of the pushback the New York City law received from trade associations like the U.S. Chamber of Commerce.²²⁵ She was quoted as saying, “I suspect that someone will probably file a lawsuit,” adding, “[w]henver you make any change and move the needle forward, it’s inevitable that some individuals will push back.”²²⁶ As of writing, there is no indication that any suit has been filed challenging the New York City law.²²⁷

D. *A National Ban on Prior Salary History Inquiries*

On May 11, 2017, Representative Eleanor Holmes Norton, a Democrat from the District of Columbia, introduced a bill to amend the FLSA to prohibit certain practices by employers regarding prior salary history, cited as the “Pay Equity for All Act of 2017.”²²⁸ This Act would introduce a new section, Section 8, to the FLSA making it unlawful for an employer to: (1) screen prospective employees based on prior salary history in such ways as (a) requiring that prior salary meet a minimum or maximum criteria, (b) requesting or requiring prior salary history as a condition of being interviewed, or (c) conditioning continued consideration for an offer of employment on the disclosure of prior salary history;²²⁹ (2) seek an applicant’s prior salary history from any current or former employer of the

<https://www.natlawreview.com/article/ban-salary-history-bans-michigan-bars-local-governments-prohibiting-such-inquiries>.

²²² *Id.*

²²³ *Id.*

²²⁴ Vin Gurrieri, *NYC Pay History Ban May Face Legal Challenge, Official Says*, LAW360 (Apr. 5, 2017), <https://www.law360.com/articles/910093/nyc-pay-history-ban-may-face-legal-challenge-official-says>.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ It is likely that opponents of these salary history bans are waiting to see what will happen with the Philadelphia litigation to see whether challenging these laws will be successful.

²²⁸ H.R. 2418, 115th Cong. (2017).

²²⁹ *Id.*

applicant,²³⁰ and (3) fire or retaliate against a current or prospective employee for: (a) opposing any of the practices made unlawful above, (b) nearing the process of making a complaint against the employer for violations of this act, or (c) testifying or is about to testify, assist, or participate in an investigation relating to the prohibited conduct.²³¹ Since being referred to the House Committee on Education and the Workforce on the same day as the bill was introduced, there has been no further action on the Pay Equity for All Act of 2017.²³²

V. ACHIEVING THE EPA'S GOALS AND CHANGING THE COURTS' ANALYSIS

In enacting these laws, either the laws themselves or the lawmakers signing them have hinted at one of the reasons for the enactment of such measures: the EPA has failed to accomplish what it set out to do. The Philadelphia law acknowledges the dismal lack of narrowing in the gender wage gap since the passage of the EPA and that relying on prior salary history perpetuates wage inequalities.²³³ Bill de Blasio, Mayor of New York City, was quoted saying, “[i]t is unacceptable that we’re still fighting for equal pay for equal work. The simple fact is that women and people of color are frequently paid less for the same work as their white, male counterparts.”²³⁴ He followed with, “[t]his Administration has taken bold steps to combat the forces of inequality that hold people back, and this bill builds upon the progress we have made to close the pay gap and ensure everyone is treated with the respect they deserve.”²³⁵ The Mayor of Delaware echoed a similar sentiment as Mayor Bill de Blasio when signing the Delaware law into legislation.²³⁶ As previously mentioned, noticeably absent from Oregon’s law outlining the bona fide reasons for a pay disparity is the vague language of “factor other than sex,” in addition to banning prior salary history.²³⁷ This suggests an awareness that employers have been utilizing the prior salary history and “factors other than sex” at large to perpetuate gender wage discrimination. The San Francisco law stated the same findings as Philadelphia, hinting at a failure of the EPA and how

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ PHILA., PA., CODE § 9-1131(b), (d) (2017).

²³⁴ *Mayor de Blasio Signs Bill Prohibiting All NYC Employers from Inquiring About Salary History of Job Applicants*, NYC (May 4, 2017), <http://www1.nyc.gov/office-of-the-mayor/news/285-17/mayor-de-blasio-signs-bill-prohibiting-all-nyc-employers-inquiring-salary-history-job#0>.

²³⁵ *Id.*

²³⁶ Vuocolo, *supra* note 111.

²³⁷ OR. REV. STAT. § 652.220(2)(a)–(i) (2017).

reliance on prior salary history perpetuates gender wage inequality, including findings related to *Rizo* regarding how relying solely on salary history would be in opposition to the goals of Congress in enacting the EPA.²³⁸ Governor Jerry Brown of California even described the “simple question” of prior salary as being a “barrier to equal pay.”²³⁹ Explicitly or implicitly, lawmakers are accelerating the goals of the EPA’s prohibitions against salary history inquiries, no longer acquiescing to the tortoise-like pace of historical progress.

Furthermore, it is incredibly difficult to determine whether an employer’s reliance on prior salary history is genuine or a pretext for taking advantage of discriminatory wage practice, or even if the applicant’s prior salary was based on sexual discrimination.²⁴⁰ Although circuit courts acknowledge the potential for employers exploiting prior salary history as a “factor other than sex,” the circuit courts continue to uphold its use as an affirmative defense, albeit without any uniformity to its application.²⁴¹ Another clear, yet unspoken, goal of these state and municipal legislatures is to eliminate prior salary history as a “factor other than sex” in its entirety so as to remove it from a court’s consideration when hearing a sex-based wage discrimination claim. While a “factor other than sex” defense is still available, prior salary history will no longer serve as an easily identifiable card for employers to play in the states and cities where the laws have been enacted.

Businesses will certainly lose one key factor used in the hiring process, making offering and negotiating a salary more difficult, especially to high-ranking executives.²⁴² Proponents of the law, however, recognize this will lead to more hiring decisions based on merit.²⁴³ Businesses still have education, experience, recommendations, references, aptitude tests, etc. to determine if a candidate is a proper fit for the job. Moreover, most of these laws do not fully eliminate the ability of an employer from asking about prior salary history or negotiating once a candidate has voluntarily disclosed such salary history.²⁴⁴ Eliminating prior salary history as a “factor other than sex”

²³⁸ S.F., CAL., MUN. CODE § 3300J.2(b)–(c), (h) (2017).

²³⁹ Roosevelt, *supra* note 155.

²⁴⁰ Hamburg, *supra* note 19, at 1090; *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 876 (1982); *see Covington v. S. Ill. Univ.*, 816 F.2d 317, 322–23 (1987).

²⁴¹ *See supra* Part II.

²⁴² *See supra* Part IV.A; Roosevelt, *supra* note 150; Elejalde-Ruiza, *supra* note 204; Gene Marks, *New Jersey May Join Philadelphia in Banning Employers from Asking New Hires About Salary History*, WASH. POST (June 27, 2017), https://www.washingtonpost.com/news/on-small-business/wp/2017/06/27/new-jersey-may-join-philadelphia-in-banning-employers-from-asking-new-hires-about-salary-history/?utm_term=.2dcfd1ceee09.

²⁴³ *Id.*

²⁴⁴ Of the laws discussed above, only San Francisco’s law prohibits an employer from relying on a candidate’s prior salary history entirely, even after the candidate has voluntarily

greatly increases the chances of further closing the wage gap and protecting women from wage discrimination while leaving businesses no worse off than before.

VI. RESOLVING THE CIRCUIT SPLIT WHILE THE LEGISLATURES ACT

Even while federal, state, and municipal legislatures push to enact their own versions of a salary-history inquiry prohibition, those states and towns without such legislation will be bound to the analysis of the circuit court of the circuit in which they are located. As such, the differing analyses should be evaluated and resolved. The reasoning of the Tenth and Eleventh Circuits, that prior salary history alone cannot be the sole justification as a “factor other than sex,”²⁴⁵ is flawed because nothing in the EPA or FLSA suggests this standard. The list of exceptions that the EPA added to the FLSA are separated with an “or” and in the “factor other than sex” language, “factor” is singular.²⁴⁶ This construction suggests that an employer need only show *one* of the enumerated exceptions, and within the catch-all provision, need only show *one* factor other than sex. By insisting that employers show prior salary history and an additional factor, the Tenth and Eleventh Circuits are imposing a higher burden on employers facing EPA and FLSA wage-discrimination challenges.

Further, the reasoning of the Seventh Circuit, that prior salary history is a valid “factor other than sex” unless there is a showing that the prior salary was the result of gender discrimination,²⁴⁷ while more reasonable, is too lenient. This approach does not conduct an inquiry into the current employer’s potential invidious behavior, and determining whether the prior employer engaged in gender-based wage discrimination is a daunting task for employees asserting a violation of the FLSA. The approach taken by the Seventh Circuit, affording employers more discretion than the Tenth and Eleventh Circuits, affords employers *too* much discretion.

Additionally, the approach taken by the Ninth Circuit is too extreme. By eliminating prior salary history from the analysis entirely,²⁴⁸ the court has taken a potentially legitimate, innocuous factor from an employer’s determination on pay. While the Ninth Circuit reasoned that the relationship between prior salary history and other legitimate, job-related factors was too attenuated to permit reliance on prior salary history,²⁴⁹ prior salary history

disclosed such information. *See supra* Part III.F.

²⁴⁵ *See supra* Part II.B.

²⁴⁶ Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56, 57; 29 U.S.C. § 206(d)(1) (1963).

²⁴⁷ *See supra* Part II.E.

²⁴⁸ *See supra* Part II.D.

²⁴⁹ *Rizo v. Yovino*, 887 F.3d 453, 467 (9th Cir. 2018).

could very well reflect how a previous employer views the quality and worth of an employee's work. The Ninth Circuit may be correct in finding that the "factor other than sex" defense is limited to legitimate, job-related factors, but it was wrong to take such a broad step in ruling that prior salary history was not such a factor.

This leaves the last approach taken by a circuit court as the best approach when resolving a plaintiff's gender-based wage discrimination claim—that taken by the Eighth Circuit. That circuit conducts a reasonableness inquiry into the employer's use of prior salary history as a "factor other than sex" or ask whether a reliance on prior salary history effectuates a business policy.²⁵⁰ This analysis is squarely in the middle of the approaches mentioned above, imposing less of a burden than the Tenth and Eleventh Circuits do, but affording employers less discretion than the Seventh Circuit does. The approach of the Eighth Circuit keeps both parties' interests in mind, suspicious of an employer's reliance on prior salary history, but willing to accept the idea that an employer innocently uses prior salary history as a legitimate factor in determining an employee's pay. So, until prior salary history prohibitions are enacted throughout the country, district courts and circuit courts should adopt the Eighth Circuit's reasoning in evaluating claims arising under the FLSA involving prior salary history.

VII. CONCLUSION

Congress enacted the EPA with the intention of eliminating gender-based wage discrimination. To protect employers, however, this Act listed exceptions, one of which is a "factor other than sex." Numerous circuit courts acknowledge that prior salary history is a "factor other than sex," varying by how much weight the courts give to that factor alone, despite the recognition that prior salary history can be exploited and abused to continue gender-based wage discrimination. Unsatisfied with the current pace of progress regarding equal pay, and unwilling to let this matter play out in the judiciary, multiple legislatures around the country have enacted legislations prohibiting inquiries into prior salary history. By their own words, lawmakers appreciate that the EPA alone is not getting the job done and recognize inquiries into prior salary history stand as an obstacle to full pay equality for equal work. This march of progress is moving rapidly and will not stop until prior salary history is eliminated as a "factor other than sex" in its entirety across the country. As a result, employers will no longer be allowed to disguise gender-based pay discrimination as an innocent reliance on prior salary history.

²⁵⁰ See *supra* Part II.C.